

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAMES R. CAVIN</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>TEAM EMPLOYMENT, LLC</b>	)	
Respondent	)	Docket No. 1,047,938
	)	
AND	)	
	)	
<b>DALLAS NATIONAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the July 6, 2011 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on November 18, 2011, in Wichita, Kansas. E.L. Lee Kinch, of Wichita, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of former Board Member Julie A.N. Sample. Gary Terrill, recently appointed Board Member, had a conflict in this matter. Therefore, Mr. Kinch remained as the Board Member Pro Tem.

**APPEARANCES**

Dale V. Slape, of Wichita, Kansas, appeared for the claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. The parties stipulated at the oral argument to the Board that if the nature and extent issue is reversed and claimant awarded a permanent partial general (work) disability, the issue may properly be determined by the Board without the necessity of a remand to the ALJ.

### ISSUES

The Administrative Law Judge found that the claimant did not sustain a permanent partial impairment to the body as a whole or a work disability and limited the permanent partial disability compensation to a 9 percent permanent partial functional impairment to the left shoulder. With this finding, the issue of whether claimant's Social Security retirement benefits giving rise to an offset was rendered moot and therefore, not addressed.

The claimant requests review of the nature and extent of his disability. Claimant argues that he has a 5 percent permanent partial whole person impairment to the thoracic spine and a 5 percent permanent partial whole person impairment to the cervical spine in addition to the 9 percent permanent partial impairment he was awarded for the left shoulder. Claimant claims entitlement to a permanent partial general (work) disability of 69 percent, based upon a 100 percent wage loss and 38 percent task loss.

Respondent argues that the ALJ should be affirmed. However, in the event claimant is found to suffer permanent impairment to the body as a whole, he should be limited to a 15 percent permanent partial whole person functional impairment because he is receiving retirement benefits from Social Security. The parties have stipulated that claimant is receiving \$460.15 per week from the Social Security Administration as a retirement benefit, which would exceed the weekly benefit claimant would be entitled to from a workers compensation award in this matter. However, claimant contends that respondent is not entitled to the offset.

### FINDINGS OF FACT

Claimant was employed as a full-time worker at Glickman Metal Recycling through respondent, a temporary employment agency. Claimant testified that on July 7, 2009, he was gathering water jugs to be filled for the workers at Glickman Metal Recycling and as he was headed back to the truck in the yard, he tripped over a wire, fell and landed on his left shoulder, upper back and neck. He immediately reported the accident to his supervisor. Claimant sought medical attention for his injuries.

Claimant first met with Dr. Dobyys and then Dr. Miller and then Dr. Eckland. Claimant had 6 weeks of physical therapy and then surgery on his left clavicle. Claimant's counsel sent him to Dr. Pedro Murati for a medical examination and the court ordered an independent medical examination (IME) with Dr. Pat Do.

At the time of the accident, claimant had been collecting Social Security retirement benefits.<sup>1</sup> Claimant began receiving those benefits as part of his retirement from Spirit

---

<sup>1</sup> Claimant testified that he receives about \$1,600.

AeroSystems in August 2007. After retiring from Spirit, claimant continued to work, obtaining a full-time job with Glickman Metal Recycling through respondent. Claimant is currently not working and therefore, claims a 100 percent wage loss.

Claimant has been released from medical treatment, but continues to have symptoms of pain and muscle spasms going from his left shoulder up into his neck and down into his upper back between his shoulder blades. Claimant testified that this pain occurs 24 hours a day and includes tightness and difficulty with range of motion in the neck and upper back. He testified that he can't move his left arm very far above his head. Claimant testified that his main concern after the July 2009 fall was his shoulder and clavicle areas. This accident also produced pain and discomfort in claimant's neck and upper back. Prior to this accident, claimant injured his clavicle in an ATV accident in Oklahoma on or about May 25, 2009.<sup>2</sup>

Dr. Christopher Miller, a board certified orthopaedic physician, provided claimant treatment to the left shoulder and clavicle for injuries sustained on or about May 23, 2009 after falling off of an ATV. Dr. Miller also met with the claimant sometime after July 10, 2009 for additional complaints claimant had related to the left clavicle. Claimant did not indicate that those additional complaints were related to a fall at work or elsewhere.

Dr. Miller ordered an x-ray which revealed that the fractured clavicle had further displaced, from the previous x-ray taken on June 18, 2009, which had revealed the original fracture.<sup>3</sup> He attributed the further displacement to the July 2009 fall. Dr. Miller indicated that it was his opinion that the fall had aggravated or exacerbated the condition diagnosed in June 2009.<sup>4</sup> Between May 23, 2009 and July 9, 2009, Dr. Miller did not provide the claimant with any additional treatment for the ATV clavicle injury.

The last time that Dr. Miller met with the claimant in October 2009, the fracture had not been healing satisfactorily and surgical repair was recommended. Dr. Miller testified that most clavicle injuries don't require surgery, but some require more aggressive treatment and that is when surgery is considered. He went on to state that when he initially met with the claimant he didn't feel that surgery was needed, but his opinion changed with the further displacement.<sup>5</sup>

---

<sup>2</sup> R.H. Trans. at 7-8.

<sup>3</sup> Miller Depo. at 6.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.* at 10.

Claimant first met with Dr. Christopher Eckland, a board certified orthopaedic physician,<sup>6</sup> on October 12, 2009. Claimant was referred to Dr. Eckland by Dr. Miller for a second opinion. At that time, claimant complained of constant pain and weakness in the left shoulder. Claimant reported that this shoulder pain was related to injuries he sustained in a four-wheeler accident in May 2009. Dr. Eckland diagnosed claimant with left shoulder clavicle nonunion and recommended surgery as a treatment option. Dr. Eckland identified the clavicle as part of the shoulder girdle.<sup>7</sup>

Claimant was reevaluated by Dr. Eckland on April 7, 2010, at which time claimant displayed some improvement while waiting for approval for surgery. Claimant reported that he was aware of the risks and wanted to go ahead with the surgery, an open reduction/internal fixation of the clavicle.

Claimant had surgery on his left shoulder on April 15, 2010 with a good result. Claimant's activities were restricted and he was sent for physical therapy. He was released on August 30, 2010, and instructed to increase his activity as tolerated with no restrictions.

On March 17, 2011, Dr. Eckland opined that although the claimant has no permanent impairment due to his left clavicle fracture, the fixation device used for clavicle fixation is very subcutaneous and is oftentimes prominent and a potential source of irritation. It may require removal at a later date.<sup>8</sup>

Dr. Eckland has no note of claimant complaining of neck pain and noted that his examination and treatment was for the shoulder. He had no opinion concerning the cervical spine.

Claimant met with Dr. Pedro Murati for an examination, at the request of his attorney, on September 23, 2010. At this evaluation, claimant had complaints of limited range of motion of the left shoulder, increased pain with weather changes, occasional sharp, "shocking" feeling in the left shoulder, occasional numbness in the left shoulder, an inability to function after increased activity without pain, and an inability to carry weight for any distance without back pain.<sup>9</sup>

Claimant reported to Dr. Murati that on Memorial Day 2009, he was injured while riding a four-wheeler, breaking three ribs and fracturing his left clavicle. Claimant also reported that his major job duty had him lifting up to 45 pounds occasionally.

---

<sup>6</sup> Dr. Eckland has been board certified since November 2010.

<sup>7</sup> Eckland Depo. at 8.

<sup>8</sup> Eckland Depo., Ex. 2 at 4 (Dr. Eckland's Mar. 17, 2011 office note).

<sup>9</sup> Murati Depo., Ex. 2 at 1 (Murati IME Report dated Sept. 23, 2010).

Dr. Murati noted in his report that the respondent had fired the claimant and that he was working for himself as a machinist. Claimant reported that he was sent for 6 weeks of physical therapy and had some benefit from that and would like to continue with that. Dr. Murati noted that the claimant did not report his back pain after his work-related injury because he felt the shoulder was more prevalent.<sup>10</sup>

Dr. Murati opined that claimant had myofascial pain syndrome of the left shoulder girdle extending into the cervical and thoracic paraspinals, bilateral carpal tunnel syndrome, aggravation of bilateral first carpometacarpal joint arthritis, and a rotator cuff tear versus sprain.<sup>11</sup> He opined that the myofascial pain syndrome of the left shoulder girdle extending into the cervical and thoracic paraspinals and rotator cuff tear versus sprain are within, medical probability, a direct result of claimant's work-related injury on July 10, 2009. The bilateral carpal tunnel syndrome, and aggravation of bilateral 1st carpometacarpal joint arthritis are due to the repetitive nature of claimant's work.<sup>12</sup>

Dr. Murati assigned permanent restrictions based on an 8 hour day of no climbing ladders, no crawling, no repetitive hand controls with the right or left, no repetitive grasping or grabbing with the right or left, no heavy grasping more than 40 kilograms with the right or left, no above the shoulder work with the right or left, no lifting, carrying, pushing, pulling more than 20 pounds, occasionally 20 pounds and frequently 10 pounds, no work more than 24 inches from the body on the left, avoid awkward positions of the neck, no use of vibratory hooks for knives with the right or the left, no use of vibratory tools with the right or left, and avoid twisting of the trunk.<sup>13</sup>

Dr. Murati went on to assign the following impairment: 10 percent impairment to the right upper extremity for right carpal tunnel syndrome (6 percent whole person), 10 percent impairment to the left upper extremity for left carpal tunnel syndrome (6 percent whole person), 9 percent left upper extremity impairment for loss of range of motion of the left shoulder (combined for an 18 percent left upper extremity, 11 percent whole person), 5 percent whole person impairment for myofascial pain syndrome of the left shoulder girdle extending into the cervical paraspinals (Cervicothoracic DRE Category II), and a 5 percent whole person impairment for myofascial pain syndrome of the left shoulder girdle extending into the thoracic paraspinals (Thoracolumbar DRE Category II). These impairments combine for a 24 percent whole person impairment.<sup>14</sup>

---

<sup>10</sup> *Id.*, Ex. 2 at 2 (Murati IME Report dated Sept. 23, 2010).

<sup>11</sup> *Id.*, Ex. 2 at 3 (Murati IME Report dated Sept. 23, 2010).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, Ex. 2 at 5 (Release to Return to Work dated Sept. 23, 2010).

<sup>14</sup> *Id.*, Ex. 2 at 3-4 (Murati IME Report dated Sept. 23, 2010).

Dr. Murati was asked to provide an impairment rating for the injuries sustained in the July 2009 fall only and he found those impairments to comprise 15 percent impairment to the whole body. This includes a 5 percent whole body impairment to the neck, 5 percent whole body impairment to the upper back, and 9 percent upper extremity impairment to the left shoulder, which converts to a 5 percent whole body impairment.<sup>15</sup> Dr. Murati utilized the 4th edition of the *AMA Guides* to determine impairment.

Dr. Murati also reviewed the task list prepared Jerry Hardin and opined that the claimant can no longer perform 13 out of 34 tasks for a 38 percent task loss.<sup>16</sup>

Claimant met with Dr. Pat Do, a board certified orthopaedic surgeon, for an IME on December 16, 2010. Claimant had complaints of left shoulder pain, lower back pain and right knee pain. Dr. Do opined that the claimant was status post open reduction and internal fixation of left clavicle and repair of nonunion. He did not find the low back or knee pain to be related to the July 2009 work accident. A pain diagram completed and signed by claimant indicated stabbing, burning pain and aches in the left shoulder, low back and right knee. There was no indication of cervical or thoracic pain complaints on the pain diagram.

Dr. Do felt that the claimant's tripping over the wire displaced a preexisting left clavicle fracture leaving claimant with a 9 percent impairment to the left upper extremity. Claimant was restricted from lifting overhead more than 21 pounds and restricted from pushing or pulling more than 51 pounds with the left shoulder.<sup>17</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>18</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>19</sup>

---

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 12.

<sup>17</sup> Do Depo., Ex. 3 at 2 (Dr. Do's Dec. 16, 2010 IME report).

<sup>18</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>19</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>20</sup>

There are three medical opinions in this record. Two opinions, that of Dr. Eckland the authorized treating physician, and Dr. Do, the court appointed independent medical examiner, agree that claimant is limited to a permanent impairment to the left shoulder. Additionally, when claimant was asked to indicate the location of his pain complaints for Dr. Do, he failed to indicate any physical problems in the cervical or thoracic spines. This information appears to directly contradict the findings of Dr. Murati, claimant's expert, that claimant injured both his neck and upper back in the fall on July 7, 2009. In workers compensation litigation, it is the claimant's burden to prove an entitlement to the benefits claimed. The ALJ determined, based upon this record, that claimant's award should be limited to the left shoulder. The Board agrees, finding no restrictions or permanent impairment to the neck or back.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>21</sup>

Dr. Do found claimant to have suffered a 9 percent functional impairment to the left shoulder as the result of this fall. The Board agrees and affirms that finding.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 6, 2011, is affirmed.

---

<sup>20</sup> K.S.A. 44-501(a).

<sup>21</sup> K.S.A. 44-510e(a).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2011.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant  
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge